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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS AUDITOR AND L. T. HALVORSON AS TREASURER OF BARNES COUNTY, ET AL.,
Respondents, and Appellees below.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor and W. D. Conway as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty as Auditor and C. A. Baumgartner as Treasurer of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Lyman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sandbek as Treasurer of Grand Forks County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor and Nels Hofland as Treasurer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of

Nelson County; Wm. W. Felson as Auditor and J. H. Hannesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Auditor and Florence Carlson as Treasurer of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortensen as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents, and Appellees below.

RESPONDENTS' BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

I. SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner's summary statement of the matters involved presents a somewhat lengthy and out-of-focus picture of the matters involved in this case. We believe the statement of

the Circuit Court of Appeals, in the opinion by Judge Stone, is much more concise and accurate:

> "Appellant here presents two main contentions. Both of them are based on the proposition that the assessment is grossly excessive. The first contention is that this excess is caused by including within the assessment property outside of the State of North Dakota. The second is that the excess was occasioned by the arbitrary action of the Board" (R. 310).

A reading of the opinion of the Circuit Court of Appeals, as set forth at page 309, *et seq.*, of the Record, as well as the specification of errors set forth at page 28 of Petitioner's Brief herein, will disclose that these were the issues; that the only issues are really questions of fact; and that all such questions were determined adversely to petitioner's contentions by the District Court and the Circuit Court of Appeals.

II. REASONS RELIED ON IN OPPOSITION TO THE ALLOWANCE OF THE WRIT.

1. The questions involved are purely questions of fact determined adversely to petitioner's contentions by both Courts below. The specifications of error (p. 28, Petitioner's Brief) all concern the conclusions of the Circuit Court of Appeals upon questions of fact only.

2. The Circuit Court of Appeals has not rendered a decision in conflict with any decision of another Circuit Court of Appeals, and no such conflict is urged by petitioner.

3. The Circuit Court of Appeals has not rendered a decision in conflict with any decision of this Court, but has conformed strictly to the decisions of this Court. The cases cited by petitioner are not in conflict with this decision:

(a) *Pennsylvania Railroad Co. vs. Jacoby & Co.*, 242 U. S. 89, holds only that the question of whether or not an unlawful method of computation was used should have been submitted to the jury. The issues here were submitted to the Court, and the Court specifically found that no unlawful method was used by the State Board (Findings 6 and 9, R. 52).

(b) *Chicago, Burlington & Quincy R. R. Co. vs. Babcock*, 204 U. S. 585, simply holds that members of the State Board should not be cross examined "with regard to the operation of their minds in valuing and taxing the roads." It does not, as contended for by petitioner, prohibit their examination as to the facts before them, or as to whether any formula or other method was followed, or as to whether the valuation was simply the result of a judgment formed upon consideration of "facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies," and matters of common knowledge. Had petitioner desired evidence on these matters, the members of the State Board could have been called and required to testify.

(c) *Fargo vs. Hart*, 193 U. S. 490, and *Wallace vs. Hines*, 253 U. S. 66, both hold that the use of relative track mileage as the *sole* basis of allocating railroad values among the states is, in some cases, unjustifiable, but no case is cited which disapproves the use of the average between the "use" factors and the track mileage factor, as the State's witness used it. In fact, in the case of *Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102, it appears that this Court approved the use of these very factors under circumstances much more adverse to their use than in the instant case.

(d) *A., T. & S. F. Ry. Co. vs. United States*, 284 U. S.

248, simply holds that the Interstate Commerce Commission should have granted a hearing to consider such evidence of changed economic conditions as might have been offered. The evidence in the instant case discloses that the State Board had a hearing, at which petitioner appeared and presented all the evidence and argument it wished, and while the evidence offered before the Board concerning the effect of the depression was negligible, the presumption is that the Board considered it for what it was worth.

3. The State's only witness did not "confess" he could not justify the assessment. He fairly and frankly discussed and analyzed the various customary methods of arriving at railroad valuations by arithmetical calculations and formulae, and disclosed the unreliability of all of them under the circumstances existing in 1933 when the assessment was made. He did frankly testify that none of the formulae with which he was familiar would produce an assessment equal to that made by the State Board, but the state statute does not permit the use of formulae as the final test of value; and the witness justified the assessment by his general statement as to the unusual circumstances existing at the time the assessment was made.

4. A consideration of this case on its merits by this Court will result only in a conclusion that North Dakota either did or did not over-assess the Great Northern Railway in 1933. No new question of federal law will be settled. All questions of law have been elaborately covered by previous decisions of this Court, and particularly by *Rowley vs. C. & N. W. Ry.*, 293 U. S. 102.

5. The tender and payment of taxes admitted to be due by the Great Northern Railway was only sixty per cent of the taxes levied. The record clearly demonstrates that such

a low figure as sixty per cent could be reached only by the use of a new and untried theory of valuation. It is undisputed that no such method was ever presented to the Board in this matter or any other. In fact, this method has never been used by any railroad or tax commission so far as any of the witnesses knew and it was prepared subsequent to the making of the assessment. There is grave doubt as to the verity and usefulness of the proposed method (see Opinion of the Court below, at page 316 of the Record). In its brief before the State Board, petitioner asked "that the Great Northern assessment be fixed at an amount not in excess of $60,000,000." The assessment was fixed at $78,832,888. The tender and payment of the petitioner was on the basis of an assessed value of $47,000,000, some $13,000,000 less than the assessment requested of the State Board by the petitioner. Reduced to taxes, the petitioner has tendered and paid nearly $300,000 less than would have been payable upon the basis of the assessment of $60,000,000 requested by petitioner. We believe this discloses an entire failure on the part of the petitioner to do equity in the premises, and should deprive the petitioner of any recourse in a court of equity.

III. STATEMENT OF THE CASE.

Petitioner has divided its statement of the case into several subdivisions, each of which requires some correction or elaboration to disclose the situation actually before the Courts below. For the convenience of the Court, we use the same headings used by petitioner.

(a) ADMITTED EXCESSIVENESS OF THE ASSESSMENT.

Respondents do not admit and never have admitted the assessment to be excessive.

No method of determining the assessed value is provided by law. The State Board is simply required to assess the property and franchise at "its true and full value in money" (Par. IV, Complaint, R. 4).

The members of the State Board were not called as witnesses. All testimony was based on computations of expert witnesses. Plaintiff's Exhibit 19 (R. 243) shows one extreme, a computed value of $23,937,317, or less than one-third of the $78,832,888 assessment. Defendants' Exhibit Q (R. 279); in schedule 3, is the other extreme in the testimony, showing a computed value of $74,967,983 (about 95% of the assessed value) when the composite of stock and bond values and capitalization of earnings is used, and $78,950,083 (a little over 100% of the assessed value) when the capitalization of earnings method alone is used for determining system value.

Much is made of the fact that the answer and the State's witness Baker "admit" that the five factor ratio is the best and most accurate method of computation. It is true that this is urged as the most accurate method of allocation of system value to the states, but this is only one step in the process of computing value by arithmetical formulae—the first and most important step is the determination of system value. In addition, the "admissions" relied on are concerned only with the relative merits of various formulae—and both the answer and the testimony of Mr. Baker, as well as the testimony of the railroad's own tax expert, Mr. Schoettler, make it clear that these formulae are no more than aids to a determination of either system value, or the value of prop-

erty within any given state. Mr. Schoettler, the Deputy Land, Tax and Right of Way Commissioner for the railroad, and the only tax expert used by petitioner, frankly admitted that "no method has yet been developed which can in an exact scientific manner fix the true value of the state's share of an interstate railway. In each case all the surrounding facts and circumstances, the conditions and the times and all that sort of thing have to be taken into consideration in order to arrive at a reasonable approximation of true value, as well as the peculiar conditions of each road" (R. 86).

Mr. Baker, the State's witness, testified: "As to my statement that the excess in the 1933 assessment over the results produced by any of these tables operated to some extent to condemn the 1933 assessment, I will say that the very best statistical evidences of value are not definite proof of value and there were a number of peculiar and extraordinary circumstances for the Board to consider in 1933 that are not in any way indicated by the statistical exhibits. I do not feel that the variance from the results produced by my table presents an absolute showing of wrongful assessment on the part of the State Board."

Among the peculiar and extraordinary circumstances existing in August, 1933, when the assessment in question was made, were the following: Stock and bond prices during the years in question were a matter of panic psychology, not of sound judgment of investors as to values. As an illustration, the Dow-Jones & Company averages of thirty industrial stocks fell from 383.17 in September, 1929, to a low of 41.22 in July, 1932, and the average of twenty rails fell from 189.11 in September, 1929, to 13.23 in July, 1932. The total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and

one-half billion dollars in September, 1929, to fifteen and one-half billion dollars in July, 1932 (R. 147). These figures indicate the utter unreliability of market price of stocks and bonds as an indicator of actual value of the underlying property.

With reference to the stock of the Great Northern Railway, Exhibit C (R. 253) gives a complete picture of the history of Great Northern stock for the 17 year period prior to the assessment date. The 17 year period is used for the reason that it is the period within which the stock should have earned $100.00, had its annual return been 6%. The exhibit shows the stock had earned $131.39 in these 17 years, and had paid $92.25 in dividends. The corporate surplus had increased from 106 million in 1916 to 149 million in 1934. In the five years preceding the assessment year the stock had earned $10.11 in 1928, $10.31 in 1929, $7.25 in 1930, $2.14 in 1931, and nothing in 1932. During the same five years dividends of $5.00, $5.00, $7.50, $2.50 and nothing had been declared. Thus in the preceding five years stockholders had received actual dividends of $20.00—yet the average market price for 1932 was only $13.20. This Exhibit C, together with the explanation thereof at page 157 of the Record, is convincing evidence that the results of any formula based in any part upon stock prices were not to be trusted in 1933.

During the months of May, June and July, 1933, immediately preceding the assessment, we were in the middle of a minor boom, and there had been a tremendous upward trend in the stock and bond market. There was a very sharp rise in Great Northern stock at that time (R. 207). The various formulae used do not take into account any stock and bond prices after the end of the last calendar year preceding the assessment.

The assessment of general property in North Dakota had not been reduced in conformity with the drastically decreased economic return from property, and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The mere fact that the securities representing a certain class of taxable property are quoted on the market, and the earnings are readily available, should not entitle that class of property to preferential treatment. Farm property constitutes about 65% of the total taxable value in North Dakota. The economic return from such property has decreased about 75% as compared with the 1924-1928 average. There has been no net return on the investment (R. 149).

The plaintiff's allegation that the assessment is excessive being denied in the answer (Pars. B and D, R. 23; Par. F, R. 26) and neither counsel nor witness having admitted the assessment to be excessive, it is obvious that there is no "admitted excessiveness" in the assessment.

(b) Factors in 1932 Assessment Making Its Adoption in 1933 Unlawful.

It is true that the 1933 assessment is the same as the 1932 assessment, except for a reduction of $17,136, and that the assessment per mile of track for these two years is identical. We do not concede, however, that this is any evidence that the Board failed to consider the situation existing in 1933 in making its 1933 assessment. The facts in this connection are concisely stated by the Circuit Court of Appeals as follows: "The evidence reveals the following: that the Board had before it data and calculations, by various methods, presented by appellant (the railroad) which referred to the 1933 assessment; that in *prior* years, calculations by various

methods prepared by the deputy Tax Commissioner had been before it; that before 1933, it had 'used' the five factor method (to what extent or just how does not appear); that the assessments of former years had never tracked any of the known methods; that, measured by any of the methods, the assessments for 1929 were approximately 101%, for 1930 approximately 96%, for 1931 approximately 97% and for 1932 approximately 101%; that by any of the methods, the assessment for 1933 was from 115.27% to 121.72%; that since 1918, the movement of annual assessments of appellant's property by the Board had been as follows: in 1919 a reduction of 4% ($3,683,000), in 1921 a reduction of 5% ($4,332,252), practically no change until 1929 when an increase of 1.25% ($1,028,291), no appreciable change in 1930, in 1931 a reduction of $294,691, in 1932 a reduction of 5% ($4,149,973), in 1933 no change; that no formula nor combination of formulae has been found to be an accurate measure of value; that formulae are merely methods worked out to aid in solving the difficult matter of value; that there is decided difference of opinion between students of values as to the relative worth of different formulae and as to their use in different situations; that there is no evidence of any deliberately arbitrary or wrongful assessment concerning years prior to 1933; that there is no evidence of what use was made by the Board of any formula either in 1933 or prior years; that there is no evidence as to how the Board reached its results in 1933 or prior assessments" (R. 317, 318).

The facts set forth at pages 8-9 hereof disclose additional considerations which the Board had the right to consider in refusing to reduce the 1932 assessment in 1933.

Plaintiff on page 17 of its brief, discusses the testimony of the witnesses Beideman and Turnburke, in which they

analyze the situation of the railroad, and paint a very dark picture of its future. The State Board was not given the benefit of these prophecies (Ex. Z-2, R. 295).

(c) Proof That Mileage Prorates Were Actually Used in Making the Assessment.

Petitioner contends that the answer does not deny and therefore admits that mileage prorates were used in allocating system value to North Dakota. It is true that the defendant did not deny paragraph IX of the complaint as fully as might have been done, but the answer does fully and completely deny that *any* formula was used by the Board, and that any use thereof by the Board as the final and conclusive determination of value would have been in violation of the statutory duties of the Board. See, particularly, paragraph E of the answer (R. 24). This contention is so completely answered by the opinion of the Circuit Court of Appeals (R. 312) that we will give it no further notice.

Petitioner then copies certain figures from Exhibit P, schedule 4. For the five years shown on Exhibit P, we find that in 1929 the assessment was 5.41% higher than computed value; in 1930 it was .18% lower; in 1931 it was .41% higher; in 1932 it was 4.29% higher; and in 1933 it was 24.52% higher than the computed value, if the computation is based upon the disputed formula. When the use of a system or formula produces variations from the assessment of 5.41%, .18%, .41%, 4.29% and 24.52% in as many years, it quite clearly appears that the formula was not used in making the assessment. The contention is well answered by the Circuit Court of Appeals thus: "From this quotation, it is clear that the proof of the *fact* that the Board used

the above five factor method is based on the *conclusions* that because the Board's assessments for several years before 1933 were not far from what would have resulted by the use of that method and because the assessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. * * * We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the state has been brought into this assessment" (R. 313, 315).

Petitioner has great difficulty in distinguishing between evidence as to what the State Tax Commissioner did, and what the State Board of Equalization did; and the same difficulty in distinguishing between the testimony of the witness Baker as to his opinions; and evidence as to what the State Board of Equalization considered or did. The record is clear that the Tax Commissioner made computations for the assistance of the Board, but the Board *never* adopted these computations. It considered them and the computations presented by the railroad, and all other matters before it, and then used its honest judgment.

(d) PROOF THAT MILEAGE PRORATES ACTUALLY ASSESS PROPERTY IN OTHER STATES:

Since there is no proof that the so-called mileage prorates were used by the State Board, our position is that any discussion of their effect, if used, is unwarranted, except in

connection with the general question of the actual market value of the railroad.

The record discloses that none of the objections to the use of the so-called mileage prorates as testified to by the witness Turnburke were made at the hearing before the State Board. In fact, the brief presented to the State Board by the railroad was based entirely upon the use of the very factors most vigorously attacked by the railroad at the trial (Ex. Z-2, R. 295, particularly at page 301).

The "grossly absurd" results produced by the use of the so-called mileage prorates and referred to at pages 25 and 26 of Petitioner's Brief have no application to the instant case. Mr. Turnburke admits, "I do not know of any situation which affects the state of North Dakota similar to the absurd result produced by allocating the revenues from ore shipments between Minnesota and Wisconsin on a mileage prorate. That illustration concerns only Minnesota and Wisconsin" (R. 127).

IV. ARGUMENT.

Once more, for the convenience of the Court, we will follow the subdivisions into which petitioner's argument is divided, using substantially the same headings used by petitioner.

(a) The Usual Rule, Requiring Proof of Some Specific Arbitrary Method, Should Be Held Applicable to the Facts in This Case.

There is no good reason why this rule should be abandoned in this case. If petitioner's only cause for complaint is that the value was computed by fundamentally erroneous principles, surely the proof should be clear and satisfactory, and the burden should rest upon the petitioner, not upon

respondents. The actions of the State Board are clothed with the wise presumption of legality and regularity. If petitioner can prove the *fact* of the calculation of value by the use of fundamentally erroneous principles, some of the authorities appear to support the proposition that this, in itself, vitiates the assessment. But the fact must be proved. The railroad here has not proved this fact. It has simply drawn some rather far-fetched conclusions. The Circuit Court below demonstrates the fallacy of petitioner's petition very clearly by its language beginning with the last paragraph on page 313 of the Record.

If this fact cannot be proved by the railroad, that does not necessarily deprive it of any defense against a wrongful assessment. If the assessing board failed to follow some legislative mandate, if it was guilty of fraud, actual or constructive, or if there has been a systematic course of intentional discrimination, the railroad may prove the same and avoid the tax. Surely the time has not come when taxpayers may simply complain of over-assessment, and thus place upon the shoulders of the assessing authorities the burden of proving each step it followed in the process of arriving at the assessment, and the correctness of the result thereof.

(b) THERE WAS NO ARBITRARY ACTION IGNORING DEPRESSION ECONOMICS.

Petitioner takes the position that because the valuation of the Great Northern was not reduced in 1933, the Board must have failed to consider depression economics. No such result necessarily follows. A consideration of depression economics, the antics of the stock market, the unreliability of all standard tests of value of all things, and of the probable benefits of the New Deal just under way at the assessment

date, together with the fact that a minor boom was just under way in the summer of 1933, might very well have been the Board's reason for *not* reducing the assessed value of the railroad in accordance with the reduction indicated by the results of arbitrary formulae based on depression statistics, ending on December 31, 1932.

Clearly the case of *A., T. & S. F. Ry. Co. vs. U. S.*, 284 U. S. 248, cited by petitioner, is not in point. In that case the rates in question were based on evidence received by the Interstate Commerce Commission at a hearing concluded in 1928. The rates were fixed in 1930, and, before they became effective, the railroad in 1930 and again in 1931 petitioned for a re-hearing, to permit it to be heard in support of contentions that the depression commencing in 1929 had completely altered the situation. The Commission denied the application, and the Court, very properly, held this to be an abuse of discretion.

In the instant case, however, the hearing was had and the property assessed by the Board in 1933. The railroad was afforded an opportunity to appear, and did appear and present its case. True, its evidence on the question of the effect of the depression is negligible, except for a brief recital of financial and operating statistics of the railroad, but it had the opportunity to present as much evidence as it desired (Ex. Z-2, R. 295).

The assessment was made after this hearing, and the presumption is that the Board took all these matters into consideration.

(c) THE ACTUAL USE BY THE STATE OF THE MILEAGE PRORATES AS A METHOD OF ALLOCATION WAS NOT SUFFICIENTLY PROVEN.

Petitioner's difficulty in distinguishing between Mr. Baker, the State's witness, and the State Board of Equalization is again apparent in its argument under this heading. Mr. Baker was never a member of the State Board. He was not even connected with the Tax Commissioner's office at the time the assessment was made, and he knew nothing whatever about the 1933 assessment, having had nothing to do with it. True, for 13 years, ending six months before the 1933 assessment was made, he had been deputy Tax Commissioner, and he had attended the meetings of the State Board during those years. His testimony concerned two phases of the issues involved. First, he testified as to the *fact* that he, as Deputy Tax Commissioner, had, during the years prior to 1933, prepared tables and exhibits for the assistance of the State Board, in the same manner as was done by the railroad experts, and that the Board considered his computations and those submitted by the railroads, and then, from this evidence and all matters of common knowledge and other evidence before it, the Board used its judgment, which never followed the exact result of any of the computations. Second, he testified as an expert witness as to his personal *opinion* of the merits and demerits of all the standard formulae used by experts to compute railroad values, and in this connection he presented numerous exhibits demonstrating the various results produced by the various methods of calculation used.

True, in his testimony, Mr. Baker did advocate and defend the use of a composite factor of allocation, based upon the average of five factors in common use, to-wit: Gross

earnings, ton and passenger miles; car and locomotive miles; all track mileage; and I. C. C. valuation. Only one of these —all track mileage—is what is commonly known as a "mileage factor"; the gross earnings, ton and passenger mileage, and car and locomotive mileage factors are known as "use factors."

Mr. Baker's use of any of these factors, or his advocacy thereof, does not constitute any evidence of their use by the Board.

(d) PETITIONER SHOULD BE REQUIRED TO NEGATIVE THE USE OF PROPER METHODS OF DETERMINING VALUE.

The presumption is that the State Board acted lawfully. The burden is on the plaintiff to show it acted otherwise. Since an injunction against the collection of taxes is a direct interference with the most important function of State Government, the proof should be extraordinarily clear and convincing.

> "It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be a clear and affirmative showing that the difference is an intentional discrimination and one adopted as a practice."
>
> *Chicago, G. W. R. Co. vs. Kendall,* 266 U. S. 94.
>
> See also: *Southern Ry. Co. vs. Watts,* 260 U. S. 519.

The proof that the 1933 assessment is the same as the 1932 assessment and that the 1932 assessment comes within 4.29% of the result which would have been arrived at had the formula to which plaintiff objects been used (Ex. P, Schedule 4), is not by any means clear and convincing

evidence that the Board did not honestly and fairly consider all the evidence and all available information, and render a reasonable judgment upon the facts before it—which is all that the law requires.

The case of *Pennsylvania R. R. Co. vs. Jacoby & Co.*, 242 U. S. 89, cited by petitioner, is not at all in conflict with the decision of the lower courts here. In that case the Court held that where the Interstate Commerce Commission reached a conclusion which exactly conformed to the results which would be obtained by using certain unlawful percentages, the question of whether or not such unlawful method was actually used should have been submitted to the jury.

In the instant case, the trial judge was the trier of both law and fact. The issue of fact as to whether or not an unlawful formula was used in the calculations of the Board was directly submitted by the pleadings and the evidence. The trial court decided that question of fact adversely to plaintiff's contentions (Findings No. 6 and No. 9, R. 52). These findings are approved by the decision of the Circuit Court of Appeals, and are clearly in conformity to the evidence.

Plaintiff contends that because of the ruling in *C., B. & Q. R. R. Co. vs. Babcock*, 204 U. S. 585, at page 593, the rule requiring plaintiff to prove his case should be relaxed. The statement in that case goes no further than to announce the proposition that members of the State Board should not be cross examined as to "the operation of their minds." There is nothing in this decision which would prohibit inquiry by the railroad of a member of the Board as to whether or not any specific formula was used.

Petitioner's contention in this connection is that since plaintiff cannot call members of the State Board and cross

examine them as to the operation of their minds, the presumption should be that their minds have operated wrongfully, and the burden should be thrown upon them of voluntarily testifying and justifying the results of their mental operations on the question. The rule announced by Mr. Justice Holmes is for the protection of state officers, not for the purpose of shifting the burden of proof and making it incumbent on the state to prove the legality of an assessment, as shown by the following language:

> "All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final notwithstanding mistakes of fact or law."

(e) Lawfulness of "Mileage Prorates."

We will not burden the Court with an extended discussion of this feature of the case. The so-called "mileage prorates" are not proven to have been used. If they were used, they are not unlawful, particularly under the facts in this case. The identical factors of allocation here criticized were approved by the railroad at the hearing before the State Board and were used in its computations of value then presented to the State Board (Ex. Z-2, R. 295, 301).

We know of no case, and petitioner has cited none, in which a combination of factors such as was used by the witness Baker in his computations has been disapproved. They are substantially the same factors as were used in the case of *Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102. In the Rowley case the disproportion between the track mile-

age factor and the average of the use factors was much greater than here. There, Wyoming's percentage of the system on the basis of traffic units was 1.58%, on the basis of the use of rolling stock, 1.65%, and on the basis of average gross and net operating revenues, 1.89%. The average of these three use factors was 1.79%. Wyoming's main track mileage was 3.29% of the system. Yet the Court, while disapproving the mileage factor as the sole test, approved the action of the State Board in averaging traffic units, use of rolling stock, average gross and net operating revenues, and main track mileage, making a final percentage of 2.10%.

Thus, these factors were permitted in the Rowley case when the main track mileage factor was 192% of the average of the three use factors.

In the instant case the average of the use factors used is 19.14%, while the all-track mileage is 19.97%—making the mileage factor 104% of the average of the use factors (Ex. N, R. 273).

If the 92% spread in the Rowley case was insufficient to require the elimination of the mileage factor, we cannot believe that the 4% spread in the instant case justifies petitioner's contention.

V. CONCLUSION.

We respectfully submit that the decision in the Courts below is strictly in accord with the previous decisions of this Court; that the contentions of petitioner are based solely upon disputed questions of fact decided against petitioner by the trier of the facts with ample support in the evidence; that no new question of interest or importance will be settled by a decision of this Court in the instant

case; and that the State of North Dakota should now be permitted to collect its 1933 taxes without further delay.

Dated this 26th day of July, 1935.

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